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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 666

MARTIN WUNDERLICH CO. (A Partnership Consisting of MARTIN WUNDERLICH, THEODORE WUNDERLICH, ANNIE M. WUNDERLICH, et al.), of the City of St. Paul, State of Minnesota, and OKES CONSTRUCTION COMPANY, etc., PETITIONERS,

vs.

THE SECRETARY OF WAR OF THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The petitioners pray that a writ of certiorari issue to review each of the orders of the United States Court of Appeals for the District of Columbia entered in the above entitled cases on January 6, 1953.[1]

[1]The orders of the Court of Appeals cover two cases involving the same parties, one relating to the fiscal year ended January 31, 1942 and the other relating to the fiscal year ended December 31, 1942. These cases were consolidated for trial in the Tax Court of the United States and were consolidated for review in the Court of Appeals (R. p. 24). Both cases are treated together here.

ORDERS BELOW

The orders of the United States Court of Appeals for the District of Columbia were entered on January 6, 1953 (R. pp. 27, 28). Those orders have not been officially reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). Although the orders of the Court of Appeals are not final determinations or judgments the jurisdiction of this Court is not affected thereby for the cited jurisdictional statute applies equally whether the case is before or after judgment. See *Forsyth v. Hammond* (1897), 166 U. S. 506, 513.[2]

QUESTIONS PRESENTED

1. May the United States of America obtain appellate review of an order of the Tax Court of the United States made pursuant to the provisions of the Renegotiation Act of 1942 redetermining excessive profits alleged to have been earned by petitioners, who are prime contractors?

2. Have the courts of appeals jurisdiction to entertain such a review under the circumstances existing in these cases where it appears that there is no general statute authorizing appellate review, and where the Renegotiation Act (Sec. 403(e)) expressly forbids it?

3. Assuming that there is a right to appellate review, then may the venue thereof be laid in the District of

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[2]As this Court stated in **Larson v. Domestic & Foreign Commerce Corp.** (1949), 337 U. S. 682, "the judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since in our view the jurisdictional issue was 'fundamental to the further conduct of the case.' " If the Court of Appeals has no jurisdiction, it would seem to be an idle gesture to permit the review below to proceed.

Columbia notwithstanding the fact that the very statute relied on by the United States of America as authority for the appellate review (Sec. 1140-1146 I. R. C.) places the venue therefor in a circuit other than that of the District of Columbia?

STATUTES INVOLVED

1. Renegotiation Act (World War II) 50 U. S. C. App. Sec. 1191. The particular provisions thereof are set forth in App. A., infra, pp. 11, 12.

2. Sections 1140 to 1146 of the Internal Revenue Code (26 U. S. C. 1140-1146).

STATEMENT

These proceedings stem from two unilateral orders of the Secretary of War determining that petitioning contractors (hereinafter called "petitioners") realized certain excessive profits for the fiscal year ended January 31, 1942 and also certain excessive profits for the fiscal year ended December 31, 1942.

Pursuant to Sec. 403(e) of the Renegotiation Act of 1942, the petitioners sought a redetermination of those unilateral orders by the Tax Court of the United States (R. p. 3, et seq.).

The cases were heard on their merits and the Tax Court entered its order in each "Pursuant to the determination of the Court as set forth in its 'Memorandum Findings of Fact and Opinion entered January 21, 1952'" (R. pp. 3-13). For the year ending January 31, 1942, the Tax Court determined "that there were no contracts subject to renegotiation and accordingly petitioners realized no excessive profits * * *" (R. p. 12). For the year ending December 31, 1942, the Tax Court determined "that

the petitioners realized excessive profits in the amount of $349,341 * * *" (R. p. 13).

On the 21st day of March, 1952 the United States of America filed a petition for review of each of these Tax Court orders with the United States Court of Appeals for the District of Columbia (R. pp. 13, 16). In those petitions the United States of America alleged that the review was being sought under Sec. 1140-1146 of the Internal Revenue Code, 26 U. S. C. 1140-1146.

On the 15th day of July, 1952, the petitioners here filed in the United States Court of Appeals for the District of Columbia Circuit, identical motions to dismiss the petitions for review by the United States of America on the following grounds (R. p. 24):

1. Neither the Court of Appeals for the District of Columbia nor any other court has jurisdiction to review decisions of the Tax Court of the United States made with respect to the redetermination of excessive profits pursuant to the Renegotiation Act.

2. In any event the Court of Appeals for the District of Columbia Circuit is not the court of proper venue to review the decision of the Tax Court involved in this proceeding.

On January 6, 1953 (R. pp. 27, 28) the United States Court of Appeals for the District of Columbia entered its orders denying the motions to dismiss the petitions for review of the United States of America on the asserted authority of its prior decisions on the matter.

REASONS FOR GRANTING THE WRIT

The orders of the United States Court of Appeals for the District of Columbia Circuit in the instant cases on the jurisdictional question are in conflict with the opinions previously expressed on the matter by this

Court. Thus in *Macauley v. Waterman S. S. Corporation* (1946), 327 U. S. 540, this Court, in making certain determinations relative to the Renegotiation Act, noted that the Act provides that "the Tax Court 'shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excess profits * * *.'"

Thereafter in *Aircraft & Diesel Equipment Corporation v. Hirsch* (1947), 331 U. S. 752, where this Court was called upon to further determine the impact of the review provisions of the Renegotiation Act of 1942, it declared:

> "It is equally clear that Congress intended to endow the Tax Court's decisions with a very large degree of finality, as appears from the very terms of § 403(e)(1), from the whole structure of the Act, and from the legislative history."

The orders of the United States Court of Appeals for the District of Columbia Circuit in the instant cases are in direct and irreconcilable conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *French v. War Contracts Price Adjustment Board* (1950), 182 F. 2d 560. The latter Court after specifically noting that its decision was in conflict with the decisions of the United States Court of Appeals for the District of Columbia Circuit, stated:

> "We think the [Renegotiation] Act prohibits the review absolutely because, (1) the Act affirmatively so provides, (2) if it does not so provide there is no provision in the Act for a review, (3) there is nothing in the provisions of the Tax Court statute which authorizes review or appeal of renegotiation cases from the Tax Court or any other court to the United States Courts of Appeals, (4) there is no general statute authorizing such review."

That decision of the Court of Appeals for the Ninth Circuit appears fully warranted in view of Section 403(e)(1) of the Renegotiation Act which expressly provides:

> "Upon such filing [of the petition for review of the Board's determination] such court [the Tax Court] shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

The pertinent provisions of the Internal Revenue Code relied upon by the United States of America in its petition for review to the Circuit Court of Appeals in this case are sections 1141 (a) and (b) which read as follows:

> "(a) Jurisdiction. The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.
>
> "(b) Venue.
>
> "(1) In general. Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.
>
> "(2) By agreement. Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United

States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

The above-quoted sections relate only to tax cases. As the Court of Appeals for the Ninth Circuit pointed out, there is no statute which authorizes a review or an appeal of renegotiation cases from the Tax Court, and the Renegotiation Act itself affirmatively precludes any such appeal or review. It is well settled that an appellate review is not essential to due process of law but is a matter of legislative grace *Luckenbach S. S. Co. v. United States* (1926), 272 U. S. 533. In any event, the United States of America, as appellant, cannot very well invoke the shelter of the Constitution to protect itself against its own enactments.

The orders of the court below raise a question under a public statute of general public importance which should be settled by a decision of this Court. Witness the fact that the question has been passed on once by the Court of Appeals for the Ninth Circuit (*French v. War Contracts Price Adjustment Board, supra*) and at least four times prior to the instant cases by the United States Court of Appeals for the District of Columbia Circuit. See *U. S. Electrical Motors, Inc. v. Jones* (1946), 153 F. 2d 134; *Blanchard Machine Co. v. R. F. C.* (1949), 177 F. 2d 727; *Lowell Wool By-Products Co. v. War Contracts Price Adjustment Board* (1951), 192 F. 2d 405; *Armstrong v. War Contracts Price Adjustment Board* (1952), 194 F. 2d 875. In addition the latter court has touched on the question in *Eastern Machinery Co. v. Under Secretary of War* (1950), 182 F. 2d 99; *Ring Construction Corp. v. Secretary of War* (1949), 178 F. 2d 714; and *Psaty & Fuhrman, Inc. v. Stimson* (1950), 182 F. 2d 985.

Emphasis on the direct and open conflict between the decisions of these two appellate courts is found in the fact that in the last three of the cited cases the Court of Appeals for the District of Columbia Circuit conceded obiter dictum that the Renegotiation Act placed exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits "including questions of both law and fact." This general statement is in accord with the ruling of the Ninth Circuit but is wholly inconsistent with the other holdings of the Court of Appeals for the District of Columbia and its orders in the instant cases.

In the interests of the administration of justice, this issue of the availability of review should be determined once and for all. Certain it is that the public interests would be promoted by the prompt settlement of this point. In addition to the cases in which this issue is presently pending before the appellate courts, there are several hundred renegotiation cases still to be submitted to the Tax Court of the United States as appears from the docket of that court. The exclusiveness of its jurisdiction and the finality of its determinations in renegotiation cases would appear to be of importance to the Tax Court; and it is unquestionably of grave and substantial concern to the administrative officials of the United States Government, to the contractors involved, and to the Congress itself.

Special concern must rest in Congress since Sec. 108 of the Renegotiation Act of 1951, 65 Stat. 21, contains a similar provision relating to the final authority of the Tax Court. It is there provided that

> "* * * any contractor or subcontractor grieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may * * * file a petition

> with the Tax Court of the United States for redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

If the language so used is ineffective to accomplish the declared purpose, it should be known so that efforts can be made to find more positive words with which to express the review prohibition.

Similar questions have arisen under section 732(c) of the Excess Profits Tax Act of 1940, as amended, 26 U. S. C. 732(c). That statute provides that if a determination of tax liability has been made by the Tax Court under the relief provisions of the Excess Profits Tax Act then "the determination of such question shall not be reviewed or redetermined by any court or agency * * *." Both the United States Court of Appeals for the Second Circuit (*George Kemp Real Estate Co. v. Commissioner* (1950), 182 F. 2d 847) and the United States Court of Appeals for the Third Circuit (*Colonial Amusement Co. v. Commissioner* (1949), 173 F. 2d 568) have held that the statute forbids any review of the determinations of the Tax Court in such cases, whether of law or fact.

The decision of the United States Court of Appeals for the District of Columbia in the instant cases then appears not only to conflict with the decisions of this court, but directly with the Ninth Circuit Court of Appeals, and apparently with the reasoning of the Second and Third Circuit Courts of Appeals. In view of the large number of undecided cases pending under the Renegotiation Act applying to World War II contracts, and the similar provisions in the present Renegotiation Act, as well as in the Internal Revenue Code, it is sub-

mitted that a determination of the matter is of great and public importance.

VENUE QUESTION

The United States of America, in its petitions for review to the United States Court of Appeals in this matter, relied on Sections 1140 to 1146 of the Internal Revenue Code. The applicable part has been heretofore quoted. The returns in this case (see Ex. HH and II in the record transmitted from the Court of Appeals to this Court) were filed with the Collector of Internal Revenue of Baltimore, which is within the geographical limits of the United States Court of Appeals for the Fourth Circuit. There was no agreement in this case placing the venue elsewhere. If there can be review in these cases then the proper venue is of great importance, both to the government and to the contractors. As the Court of Appeals for the Ninth Circuit stated in the *French* case, supra:

> "* * * the venue provisions were never made to fit a review or appeal as to renegotiation actions because there never was a 'substantive right of appeal' conferred upon the Courts of Appeals to 'nullify.' "

CONCLUSION

It is respectfully submitted, for the reasons stated above, that this petition for writ of certiorari should be granted.

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APPENDIX A

Renegotiation Act

Several Congressional enactments are collectively known as The Renegotiation Act. The first Renegotiation Act was Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, an Act of April 28, 1942, 56 Stat. 245. It was amended October 21, 1942, 56 Stat. 982, and by an Act of July 1, 1943, 57 Stat. 348 and again by an Act of July 14, 1943, 57 Stat. 564; also by Sec. 701 of the Revenue Act of 1943, an Act of February 25, 1944, 58 Stat. 78, and further by an Act of June 30, 1945, 59 Stat. 294. The provisions thereof pertinent to this proceeding are Sec. 403(e) reading as follows:

> "(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect to the contractor, the subcontractor, the Board and

the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * *

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a)(5)(B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District Court of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943, which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

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MEMORANDUM FOR RESPONDENT IN OPPOSITION

From the inception of litigation seeking appellate review of Tax Court determinations under the Renegotiation Act (Act of April 28, 1942, 56 Stat. 245, as amended, 50 U.S.C. App. 1191), the Government has taken the consistent position that the finality clause of the statute makes such determi-

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1. Neither the Court of Appeals for the District of Columbia nor any other court has jurisdiction to review decisions of the Tax Court of the United States made with respect to the redetermination of excessive profits pursuant to the Renegotiation Act.

2. In any event the Court of Appeals for the District of Columbia Circuit is not the court of proper venue to review the decision of the Tax Court involved in this proceeding.

On January 6, 1953 (R. pp. 27, 28) the United States Court of Appeals for the District of Columbia entered its orders denying the motions to dismiss the petitions for review of the United States of America on the asserted authority of its prior decisions on the matter.

REASONS FOR GRANTING THE WRIT

The orders of the United States Court of Appeals for the District of Columbia Circuit in the instant cases on the jurisdictional question are in conflict with the opinions previously expressed on the matter by this

Court. Thus in *Macauley v. Waterman S. S. Corporation* (1946), 327 U. S. 540, this Court, in making certain determinations relative to the Renegotiation Act, noted that the Act provides that "the Tax Court 'shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excess profits * * *.'"

Thereafter in *Aircraft & Diesel Equipment Corporation v. Hirsch* (1947), 331 U. S. 752, where this Court was called upon to further determine the impact of the review provisions of the Renegotiation Act of 1942, it declared:

> "It is equally clear that Congress intended to endow the Tax Court's decisions with a very large degree of finality, as appears from the very terms of § 403(e)(1), from the whole structure of the Act, and from the legislative history."

The orders of the United States Court of Appeals for the District of Columbia Circuit in the instant cases are in direct and irreconcilable conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *French v. War Contracts Price Adjustment Board* (1950), 182 F. 2d 560. The latter Court after specifically noting that its decision was in conflict with the decisions of the United States Court of Appeals for the District of Columbia Circuit, stated:

> "We think the [Renegotiation] Act prohibits the review absolutely because, (1) the Act affirmatively so provides, (2) if it does not so provide there is no provision in the Act for a review, (3) there is nothing in the provisions of the Tax Court statute which authorizes review or appeal of renegotiation cases from the Tax Court or any other court to the United States Courts of Appeals, (4) there is no general statute authorizing such review."

That decision of the Court of Appeals for the Ninth Circuit appears fully warranted in view of Section 403(e)(1) of the Renegotiation Act which expressly provides:

> "Upon such filing [of the petition for review of the Board's determination] such court [the Tax Court] shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

The pertinent provisions of the Internal Revenue Code relied upon by the United States of America in its petition for review to the Circuit Court of Appeals in this case are sections 1141 (a) and (b) which read as follows:

> "(a) Jurisdiction. The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.
>
> "(b) Venue.
>
> "(1) In general. Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.
>
> "(2) By agreement. Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United

States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

The above-quoted sections relate only to tax cases. As the Court of Appeals for the Ninth Circuit pointed out, there is no statute which authorizes a review or an appeal of renegotiation cases from the Tax Court, and the Renegotiation Act itself affirmatively precludes any such appeal or review. It is well settled that an appellate review is not essential to due process of law but is a matter of legislative grace *Luckenbach S. S. Co. v. United States* (1926), 272 U. S. 533. In any event, the United States of America, as appellant, cannot very well invoke the shelter of the Constitution to protect itself against its own enactments.

The orders of the court below raise a question under a public statute of general public importance which should be settled by a decision of this Court. Witness the fact that the question has been passed on once by the Court of Appeals for the Ninth Circuit (*French v. War Contracts Price Adjustment Board, supra*) and at least four times prior to the instant cases by the United States Court of Appeals for the District of Columbia Circuit. See *U. S. Electrical Motors, Inc. v. Jones* (1946), 153 F. 2d 134; *Blanchard Machine Co. v. R. F. C.* (1949), 177 F. 2d 727; *Lowell Wool By-Products Co. v. War Contracts Price Adjustment Board* (1951), 192 F. 2d 405; *Armstrong v. War Contracts Price Adjustment Board* (1952), 194 F. 2d 875. In addition the latter court has touched on the question in *Eastern Machinery Co. v. Under Secretary of War* (1950), 182 F. 2d 99; *Ring Construction Corp. v. Secretary of War* (1949), 178 F. 2d 714; and *Psaty & Fuhrman, Inc. v. Stimson* (1950), 182 F. 2d 985.

Emphasis on the direct and open conflict between the decisions of these two appellate courts is found in the fact that in the last three of the cited cases the Court of Appeals for the District of Columbia Circuit conceded obiter dictum that the Renegotiation Act placed exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits "including questions of both law and fact." This general statement is in accord with the ruling of the Ninth Circuit but is wholly inconsistent with the other holdings of the Court of Appeals for the District of Columbia and its orders in the instant cases.

In the interests of the administration of justice, this issue of the availability of review should be determined once and for all. Certain it is that the public interests would be promoted by the prompt settlement of this point. In addition to the cases in which this issue is presently pending before the appellate courts, there are several hundred renegotiation cases still to be submitted to the Tax Court of the United States as appears from the docket of that court. The exclusiveness of its jurisdiction and the finality of its determinations in renegotiation cases would appear to be of importance to the Tax Court; and it is unquestionably of grave and substantial concern to the administrative officials of the United States Government, to the contractors involved, and to the Congress itself.

Special concern must rest in Congress since Sec. 108 of the Renegotiation Act of 1951, 65 Stat. 21, contains a similar provision relating to the final authority of the Tax Court. It is there provided that

> "* * * any contractor or subcontractor grieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may * * * file a petition

> with the Tax Court of the United States for redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

If the language so used is ineffective to accomplish the declared purpose, it should be known so that efforts can be made to find more positive words with which to express the review prohibition.

Similar questions have arisen under section 732(c) of the Excess Profits Tax Act of 1940, as amended, 26 U. S. C. 732(c). That statute provides that if a determination of tax liability has been made by the Tax Court under the relief provisions of the Excess Profits Tax Act then "the determination of such question shall not be reviewed or redetermined by any court or agency * * *." Both the United States Court of Appeals for the Second Circuit (*George Kemp Real Estate Co. v. Commissioner* (1950), 182 F. 2d 847) and the United States Court of Appeals for the Third Circuit (*Colonial Amusement Co. v. Commissioner* (1949), 173 F. 2d 568) have held that the statute forbids any review of the determinations of the Tax Court in such cases, whether of law or fact.

The decision of the United States Court of Appeals for the District of Columbia in the instant cases then appears not only to conflict with the decisions of this court, but directly with the Ninth Circuit Court of Appeals, and apparently with the reasoning of the Second and Third Circuit Courts of Appeals. In view of the large number of undecided cases pending under the Renegotiation Act applying to World War II contracts, and the similar provisions in the present Renegotiation Act, as well as in the Internal Revenue Code, it is sub-

mitted that a determination of the matter is of great and public importance.

VENUE QUESTION

The United States of America, in its petitions for review to the United States Court of Appeals in this matter, relied on Sections 1140 to 1146 of the Internal Revenue Code. The applicable part has been heretofore quoted. The returns in this case (see Ex. HH and II in the record transmitted from the Court of Appeals to this Court) were filed with the Collector of Internal Revenue of Baltimore, which is within the geographical limits of the United States Court of Appeals for the Fourth Circuit. There was no agreement in this case placing the venue elsewhere. If there can be review in these cases then the proper venue is of great importance, both to the government and to the contractors. As the Court of Appeals for the Ninth Circuit stated in the *French* case, supra:

> "* * * the venue provisions were never made to fit a review or appeal as to renegotiation actions because there never was a 'substantive right of appeal' conferred upon the Courts of Appeals to 'nullify.'"

CONCLUSION

It is respectfully submitted, for the reasons stated above, that this petition for writ of certiorari should be granted.

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APPENDIX A

Renegotiation Act

Several Congressional enactments are collectively known as The Renegotiation Act. The first Renegotiation Act was Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, an Act of April 28, 1942, 56 Stat. 245. It was amended October 21, 1942, 56 Stat. 982, and by an Act of July 1, 1943, 57 Stat. 348 and again by an Act of July 14, 1943, 57 Stat. 564; also by Sec. 701 of the Revenue Act of 1943, an Act of February 25, 1944, 58 Stat. 78, and further by an Act of June 30, 1945, 59 Stat. 294. The provisions thereof pertinent to this proceeding are Sec. 403(e) reading as follows:

> "(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect to the contractor, the subcontractor, the Board and

the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * *

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a)(5)(B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District Court of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943, which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 666

MARTIN WUNDERLICH CO. (A PARTNERSHIP CONSISTING OF MARTIN WUNDERLICH, THEODORE WUNDERLICH, ANNE M. WUNDERLICH, ET AL.), OF THE CITY OF ST. PAUL, STATE OF MINNESOTA, AND OKES CONSTRUCTION COMPANY, ETC., PETITIONERS

v.

THE SECRETARY OF WAR OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

From the inception of litigation seeking appellate review of Tax Court determinations under the Renegotiation Act (Act of April 28, 1942, 56 Stat. 245, as amended, 50 U.S.C. App. 1191), the Government has taken the consistent position that the finality clause of the statute makes such determi-

nations not reviewable by the courts of appeals on any issue.[1] The Court of Appeals for the Ninth Circuit has expressed its agreement with this construction of the Renegotiation Act. *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560; *Warner* v. *War Contracts Price Adjustment Board*, 188 F. 2d 363. The Court of Appeals for the District of Columbia Circuit, to which the question was first presented, although of the opinion that the Act "places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination" (*U.S. Electrical Motors* v. *Jones*, 153 F. 2d 134, 136), has held that it has jurisdiction to review Tax Court determinations insofar as issues are raised going to the jurisdiction of the Tax Court or the constitutionality of the Renegotiation Act. *U. S. Electrical Motors* v. *Jones, supra; Blanchard Machine Co.* v. *R.F.C.*, 177 F. 2d 727, certiorari denied, 339 U.S. 912; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405; *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, certiorari denied, 343 U.S. 967. See also note 8, *infra*, p. 8.

The question of finality *vel non* being settled in the District of Columbia Circuit, the Government

[1] It should be noted, however, that the Government did not take the view that judicial review of the constitutionality of the Act was foreclosed in all circumstances. Concededly, that issue—but only that issue—may be judicially determined in an appropriate case, *e.g.*, in a suit by the United States in the district court to enforce a renegotiation determination. Cf. *Lichter* v. *United States*, 334 U.S. 742.

sought review in the Court of Appeals in the instant case in the belief that, although it had opposed the adoption of the rule announced by the court below, it was not precluded in good conscience from availing itself of that rule in that court.[2] Petitioners, on the other hand, departing from the position previously taken by other contractors and sub-contractors in the court below, moved to dismiss the Government's appeal for want of jurisdiction. Upon the denial of that motion, and in advance of any hearing on the merits of the Tax Court's determination, petitioners have applied to this Court for a writ of certiorari before judgment.

Although there are grounds which support the interpretation given the Renegotiation Act by the court below, we are in accord with petitioners that the arguments which may be advanced to the con-

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[2] The issues for decision in the Tax Court were as follows: "(1) Is the Renegotiation Act of 1942, as amended, constitutional? (2) Was renegotiation timely commenced as to all contracts involved? (3) What accounting basis should be used? (4) Is contract PC1p-571 renegotiable?" (R. 4). The Tax Court held (1) that the Act is constitutional; (2) that renegotiation proceedings were not timely commenced as to Contract No. PC1p-571 but were as to petitioners' other contracts; and (3) that the proper accounting basis had been employed by the Government (R. 11-12). Having held that renegotiation proceedings were not timely commenced as to Contract No. PC1p-571, the Tax Court found it unnecessary to decide whether the contract, which had been executed by The Panama Canal, is renegotiable although The Panama Canal is not defined as a "Department" in Section 403(a)(1) of the Act (50 U.S.C. App. 1191(a)(1)). The issue on appeal is whether renegotiation proceedings were timely commenced as to Contract No. PC1p-571 (R. 15, 18). *Blanchard Machine Co.* v. *R.F.C.*, *supra*, holds that that issue goes to the jurisdiction of the Tax Court and is, therefore, reviewable.

trary are probably more persuasive. Nevertheless, we believe that further review by this Court would not be warranted at this time for two reasons: (1) the question is not ripe for adjudication; and (2) the conflict of decisions betwen the Ninth and District of Columbia Circuits does not require resolution by this Court.

1. In *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, and *Lichter* v. *United States*, 334 U.S. 742, this Court was afforded the opportunity to decide whether Tax Court determinations under the Renegotiation Act were subject to judicial review. It carefully refrained, however, from passing on that question.[3] As the Court pointed out in the *Aircraft & Diesel Corp.* case (331 U.S. at 772-773):

> The Tax Court may decide entirely in appellant's favor. Indeed, if it can sustain there

[3] In the *Waterman* case, the Court stated that whether the district court "*ever can do so or not*, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination." 327 U.S. at 544 [emphasis added]. Similarly, in the *Aircraft & Diesel Corp.* case, the Court declared: "We do not express any opinion, indeed we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters. * * * We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose." 331 U.S. at 771. And in the *Lichter* case, the court again observed that "we do not have before us, and we do not express an opinion upon, the finality which would have attached to a redetermination by the Tax Court if such a redetermination had been sought and made." 334 U.S. at 791.

the claims and issues it offers to support here, that possibility is not an unlikely one. For, apart from the questions of constitutionality and of the Tax Court's power to decide them finally or otherwise, appellant has put forward, in both proceedings, claims of exemption and noncoverage relating to contracts involving much larger amounts than the aggregate sums affected by renegotiation, after deduction of tax credits. And if those claims are well founded, as to which of course we express no opinion, the Tax Court's determination of these matters of coverage, which we held in the *Waterman* case are initially at least for its disposition, well might render consideration of the constitutional questions by it unnecessary and this cause moot.

Certainly that possible outcome should not be anticipated, either here or by the District Court, through a decision in this case on the constitutional issues. *Rescue Army* v. *Municipal Court,* 331 U.S. 549. No more should it be forestalled by decision upon the matters of coverage. *Macauley* v. *Waterman S. S. Corp., supra.*

Similar considerations, we believe, prevail in the instant case. The court below may decide, after a hearing on the merits, in petitioners' favor that the Tax Court correctly held that renegotiation proceedings were not timely commenced as to Contract No. PC1p-571 (see not 2, *supra,* p. 2). Accordingly, its disposition of that issue well might render consideration by this Court of the question

of finality of Tax Court determinations unnecessary. Moreover, even if the court below were to hold that renegotiation proceedings were timely commenced as to Contract PC1p-571, there still remains the further question, not reached by the Tax Court, whether Contract No. PC1p-571, a contract executed by the Panama Canal, is renegotiable although The Panama Canal is not defined as a "Department" in Section 403(a)(1) of the Act (50 U.S.C. App. 1191(a)(1)). Should that question be decided in petitioners' favor on remand to the Tax Court, consideration by this Court of the finality question would probably be unnecessary.[4]

2. Moreover, the conflict of decisions is not such as requires resolution by this Court.[5] To begin with, the normal consequences of a conflict—ex-

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[4] The posture of the instant case is thus unlike *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, and *Land* v. *Dollar*, 330 U.S. 731, where certiorari was granted to review an interlocutory determination of jurisdiction. In those cases, the jurisdictional issue was thought fundamental to the further conduct of the case because the question of jurisdiction there, *viz.*, whether the actions were unconsented suits against the United States, might turn on the ultimate disposition of the cases on the merits.

[5] Contrary to petitioners' suggestion (Pet. 9), the decision below does not conflict with the reasoning of the Second and Third Circuits in cases arising under the Excess Profits Tax Act of 1940, as amended, 26 U.S.C. 732(c). Examination of those decisions reveals that the finality accorded to Tax Court determinations under Sections 711(b)(1)(H), (I), (J), or (K), 721, and 722 of the Internal Revenue Code rests upon the fact that those sections "create special relief, credits, or the like" and "are matters of legislative grace." *James F. Waters, Inc.* v. *Commissioner of Internal Revenue*, 160 F. 2d 596, 598 (C.A. 9) (relied upon in *George Kemp Real Estate Co.* v. *Commissioner of Internal Revenue*, 182 F. 2d 847, 848, n. 2 (C.A. 2), and *Colonial Amusement Co.* v. *Commissioner of Internal Revenue*, 173 F. 2d 568, 569 (C.A. 3)).

penses and delays of litigation and unjustifiable discriminations between litigants in different jurisdictions—are not present here. Since it is settled in the District of Columbia Circuit that review may be had on jurisdictional and constitutional questions, and since, if venue is laid anywhere, it is laid in the District of Columbia Circuit,[6] all litigants are afforded an opportunity for review in that circuit.

Second, the conflict of decisions may be more apparent than real. Although the Ninth Circuit disagrees with the District of Columbia Circuit's ruling that the Renegotiation Act permits review in the courts of appeals of jurisdictional and constitutional questions, it may be of the view that those questions can be judicially reviewed in suits brought by the Government in the district courts to enforce Tax Court determinations. *French* v. *War Contracts Price Adjustment Board*, *supra* at 565; cf. *Lichter* v. *United States*, 334 U.S. 742. See note 1, *supra*, p. 2.

Finally, the court should be apprised of the state of appellate litigation in this field. To date, some 900 petitions for review under the 1942 Act have been filed in the Tax Court.[7] Of those 900 cases, some 200 cases still remain on the docket of the Tax Court. Of the some 700 cases disposed of by the Tax Court, only fifteen cases were appealed to the

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[6] *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560 (C.A. 9).

[7] As yet, no petitions for review have been filed in the Tax Court under the 1948 and 1951 Renegotiation Acts.

courts of appeals.[8] As to the 1948 Renegotiation Act (Act of May 21, 1948, 62 Stat. 259, 50 U.S.C. App., Supp. V, 1193), the finality question clearly does not arise. That Act expressly provides that Tax Court determinations "shall be subject to review to the extent and in the manner provided by subchapter B of chapter 5 of the Internal Revenue Code [sections 1140-1146 of Title 26]." (Sec. 3(e) 50 U.S.C. App. 1193(e)). The 1951 Renegotiation Act (Act of March 23, 1951, 65 Stat. 7, 50 U.S.C. App., Supp. V, 1211-1233), on the other hand, is even more specific than the 1942 Act (as amended) in its exclusion of judicial review. Not only does the 1951 Act incorporate the finality language of the 1942 Act (Sec. 108, 50 U.S.C. App. 1218), but it explicitly states that "The functions exercised under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of Section 3, thereof." (Sec. 111, 50 U.S.C. App. 1221).[9]

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[8] In addition to the present case and the cases already cited above, pp. 2, 4, see *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714 (C.A.D.C.), certiorari denied, 339 U.S. 943; *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99 (C.A.D.C.); *Psaty & Fuhrman* v. *Stimson*, 182 F. 2d 985 (C.A.D.C.); *Maguire Industries, Inc.* v. *Secretary of War*, 185 F. 2d 434 (C.A.D.C.); *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board*, 195 F. 2d 198 (C.A.D.C.); *Warner & Swasey Co.* v. *War Contracts Price Adjustment Board*, 201 F. 2d 201 (C.A.D.C.), No. 588, this Term, certiorari denied April 6, 1953. Two other cases are now pending on appeal in the court below.

[9] Section 3 of the Administrative Procedure Act (5 U.S.C. 1002) sets forth the requirements as to publication of information, rules, opinions, orders and public records.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1953.

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